

MINUTES

MONTANA SENATE 59th LEGISLATURE - REGULAR SESSION

COMMITTEE ON JUDICIARY

Call to Order: By **CHAIRMAN MIKE WHEAT**, on February 18, 2005 at 8 A.M., in Room 102 Capitol.

ROLL CALL

Members Present:

Sen. Mike Wheat, Chairman (D)
Sen. Brent R. Cromley (D)
Sen. Aubyn Curtiss (R)
Sen. Jon Ellingson (D)
Sen. Jesse Laslovich (D)
Sen. Dan McGee (R)
Sen. Jerry O'Neil (R)
Sen. Gerald Pease (D)
Sen. Gary L. Perry (R)
Sen. Jim Shockley (R)

Members Excused: Sen. Lynda Moss (D)

Members Absent: Sen. Jeff Mangan (D)

Staff Present: Valencia Lane, Legislative Branch
Mari Prewett, Committee Secretary
Linda Keim, Transcribing Secretary

Please Note. These are summary minutes. Testimony and discussion are paraphrased and condensed.

Committee Business Summary:

Hearing & Date Posted: SJ 27, SJ 26, SB 391, SB 392, SB
394, SB 397, SB 399, SB 400,
2/11/2005
Executive Action: None.

HEARING ON SJ 27**Opening Statement by Sponsor:**

SEN. DAN HARRINGTON SD 38, BUTTE, opened the hearing on **SJ 27**, a Resolution urging opposition to Federal tort reform legislation for asbestos victims unless the residents of Libby, MT, are also included and receive compensation. He passed around an article from the Montana Standard dated 2/13/05, "Decades of Denial."

EXHIBIT(jus40a01)

{Tape: 1; Side: A; Approx. Time Counter: 0 - 5.8}

Proponents' Testimony:

John Bohlinger, Montana's Lieutenant Governor, read written testimony in support of the Resolution.

EXHIBIT(jus40a02)

{Tape: 1; Side: A; Approx. Time Counter: 5.8 - 9}

Roger Sullivan, Kalispell Attorney, representing 500 Libby citizens who have been injured by asbestos from W. R. Grace's mine passed around copies of his testimony and supporting documents.

EXHIBIT(jus40a03)

{Tape: 1; Side: A; Approx. Time Counter: 9 - 15.5}

LeRoy Thom, Self, spoke in support of SJ 27. He worked at the W. R. Grace mine site for 17 years and is an asbestos victim. He serves on several of the committees dealing with the asbestos issues and is President of Libby Asbestos Medical Program (LAMP). LAMP is a non-profit corporation formed to receive and administer the expenditure of \$2.75 million received from W. R. Grace pursuant to a legal settlement. W. R. Grace had to deposit this money into a special fund for asbestos related health care not covered under their medical plan and this is a supplemental plan. LAMP is responsible for administration of the funds and has selected a third-party-administrator, New West Health Services.

The problem with the Grace Plan is that, at their discretion, Health Net America (HNA), Grace's third-party-administrator denied benefits to members diagnosed with asbestos-related disease. They are denying oxygen benefits and have cut back on pulmonary function testing. They have required patients to drive

long distances to receive second opinions. He said they are able to do this because their program is self-funded and they are not regulated. He explained that the LAMP fund has a finite amount of money to work with and will eventually run out.

{Tape: 1; Side: A; Approx. Time Counter: 15.5 - 19.1}

Gayla Benefield, Libby, said 1500 Libby residents have been diagnosed with asbestos-related disease. About ten new people per month are being diagnosed, with the average person being 40-50 years of age. With the new criteria and the level of disease in Libby, 90% are not eligible to receive compensation under Federal asbestos legislation. She said that people are doing a good job of taking care of themselves, but the bar is constantly being lifted. When progressive health decline occurs, no amount of medical knowledge can do anything to stop it.

She said they have a center for asbestos-related disease and have gone into national research. They are trying to help everyone they can, but the next generation is high-risk also, because there was material on the playground where the children played. She stated that the fairness bill would only run for 25 years and there are people who will not be diagnosed for 30-plus years. People are not asking for a handout, only a helping hand.

Gordon Sullivan, Libby, spoke in favor of the Resolution. He explained that it is a misconception that Libby will be left a clean, pristine community. The Environmental Protection Association (EPA) is limited in their funding for the physical cleanup of the property. Property owners have to absorb the remaining costs for that, as well as pay for some of their own medical expenses. He stated that this small community can only be expected to absorb a certain amount of costs.

{Tape: 1; Side: A; Approx. Time Counter: 19.1 - 26.4}

Don Judge, Teamsters Local 190 and on behalf of himself, said W. R. Grace insulated 15-25 million homes around the country with their products. Residents are asking the legislature to hold Congress' feet to the fire, and if they enact legislation for any kind of relief, that they recognize the needs of the citizens. This Resolution is an important step towards doing that.

{Tape: 1; Side: A; Approx. Time Counter: 26.4 - 28.9}

Gene Fenderson, Montana District Council of Laborers Union, said thousands of their members worked on Libby Dam and are covered under the Laborers Health and Welfare plans. Rip-rap and dust from the mine was used to backfill on Libby Dam. They have often

wondered how much money it cost their employers and their members for the respiratory and asbestos problems that members and their children have. He asked that the Resolution be passed.

{Tape: 1; Side: B; Approx. Time Counter: 0 - 1.6}

Jeff Barber, Montana Environmental Information Center (MEIC), said he couldn't add anything to the information that has already been supplied and asked that the Resolution be passed.

Debra Ryan, Libby, said her father was an asbestos victim who died in 2004 and he had filed a civil suit to make W. R. Grace accountable for the disease he was suffering from. He served as a member of the Asbestos Personal Injury Committee.

Michele Reinhart, Self, sent written testimony and a copy of a Billings Gazette article from 2/13/2005, "Indictments give Libby Asbestos Victims Hope."

EXHIBIT(jus40a04)

Opponents' Testimony: None.

Informational Testimony: None.

Questions from Committee Members and Responses:

SEN. MCGEE asked if W. R. Grace Company has been convicted of any crime. **Mr. Sullivan** said they have only been convicted of crimes arising out of exposures that occurred in Massachusetts, based on allegations released by the U. S. Justice Department on February 7, 2005. There has not been a criminal trial.

SEN. MCGEE asked if W. R. Grace has been adjudicated by a court that said they are guilty of any crime in Libby. **Mr. Sullivan** said they have not been convicted of any crimes in Libby.

{Tape: 1; Side: B; Approx. Time Counter: 1.6 - 5.1}

Closing by Sponsor:

SEN. HARRINGTON said it isn't necessary to look at whether they have been found guilty in a court of law because of the things that have occurred, and because of what this company has done while knowing what was going on. He said he hoped that W. R. Grace is held responsible. He asked that the Resolution be passed to take care of the people that have been injured.

{Tape: 1; Side: B; Approx. Time Counter: 5.1 - 6.5}

HEARING ON SJ 26**Opening Statement by Sponsor:**

SEN. AUBYN CURTISS, SD 1, Fortine, opened the hearing on **SJ 26**, a Resolution urging support for Libby asbestos victims. She said that possible victims of asbestos exposure will have no protection if there is an earlier settlement, and they are not eligible to obtain insurance for themselves because of their illness. The fund in Congress is probably the only remedy that will be offered to them, so it is critical to ask Congress to make a special dispensation for these Libby victims. There are 600,000 asbestos cases in Federal courts currently and it is shocking the system.

Proponents' Testimony:

Roger Sullivan, Kalispell Attorney, representing 500 Libby residents who suffer from asbestos-related disease, said he has circulated a proposal that attempts to take provisions from SEN. CURTISS' proposed SJ 26 and combine them with SEN. HARRINGTON'S SJ 25. Although W. R. Grace has not been convicted of the indictments handed down against Grace and seven of its executives, it has been determined in Libby courts, 1997-1999, that they were responsible for injuries caused there, that they awarded punitive damages against Grace, and the Montana Supreme Court upheld the award because Grace maliciously or fraudulently recklessly disregarded the health and welfare of its workers. He said that is public record, and asked the Committee to do the right thing.

{Tape: 1; Side: B; Approx. Time Counter: 6.5 - 15.5}

Opponents' Testimony: None.

Informational Testimony: None.

Questions from Committee Members and Responses:

SEN. MCGEE said there is no evidence to prove the allegations that are made in the bills and asked him to provide the Committee with a copy of the citations he alleged. **Mr. Sullivan** said that he will provide the information.

Closing by Sponsor:

SEN. CURTISS said a lot of harm has been done in Libby and cautioned, "When a message is sent to members of Congress, we should be careful not to enter into any of the politics going on

in Washington. We need to simply make provision that the people in Libby will be taken care of and that the trust fund will not be implemented in such a way there is closure that precludes people from getting the help they need".

{Tape: 1; Side: B; Approx. Time Counter: 15.5 - 17.6; Comments: End of Tape 1B}

CHAIRMAN WHEAT stated that **SEN. BALLYEAT** will open and close on six bills at the same time, and proponents and opponents will be heard individually for each bill.

HEARING ON SB 391, SB 392, SB 394, SB 397, SB 399, SB 400

{Tape: 2; Side: A; Approx. Time Counter: 0; Comments: Tape 2A begins.}

Opening Statement by Sponsor:

SEN. JOE BALLYEAT, SD 34, BOZEMAN, opened the hearing on **SB 391, SB 392, SB 394, SB 397, SB 399, SB 400**, and said that all are bills that aim at judicial reform. He explained all bills simultaneously. He is concerned that the Supreme Court is becoming too powerful because they have no checks and balances in place on their actions and no one can over-rule their actions. He handed out Amendments SB 039901, SB039902, and his written testimony, which was read.

[EXHIBIT\(jus40a05\)](#)

[EXHIBIT\(jus40a06\)](#)

[EXHIBIT\(jus40a07\)](#)

{Tape: 2; Side: A; Approx. Time Counter: 0 - 36}

{Tape: 2; Side: B; Approx. Time Counter: 0 - 9; Comments: Continuation of SEN. BALLYEAT's opening statements}

Proponents' Testimony:

Bruce Simon, Self, said he was testifying on SB 399 and stated that the Committee's vote may reflect how the court may react to someone if they have to appear before it in the future. Article 2 of the Montana Constitution, Section 9, is the right to know. He said that means there have to be open meetings for all public bodies and did not see an exception to that for the Supreme Court. He said it is time to tell them that the provisions of the Montana Constitution apply to the Supreme Court as well as everybody else. He stated, "In a larger sense, the bill is

unnecessary, they still have the obligation since they took the oath of office". He urged impeachment of the justices because they are violating the rules of their oath of office.

{Tape: 2; Side: A; Approx. Time Counter: 9 - 14.7}

Harris Himes, Montana Family Coalition, said he is in favor of all the bills, and SB 399 duplicates **SEN. HARRINGTON'S** bill. He applauded **SEN. BALLYEAT** for bringing some important bills. He stated there is strong feeling with CI-75 that the restriction on who could practice law in Montana was made with direct reference to Rob Natelson, so he would not be able to argue CI-75 in front of the Supreme Court. Mr. Himes noted that the price of liberty is diligence, vigilance, and courage. He appealed to the members saying, "If some members of the Bar find some kind of conflict here, then I would encourage you ethically to recuse yourself from voting on these matters".

Dallas Erickson, Self, sent written testimony supporting SB 391, SB 394, SB 397, SB 399, SB 400.

EXHIBIT(jus40a08)

{Tape: 2; Side: A; Approx. Time Counter: 14.7 - 21.8}

Esther Fishbaugh, Self, said she supports SB 391, SB 394, SB 397, SB 399, and SB 400. She stated that the courts need to be made more accountable to the people when they go against the people's expressed preferences. She said, "They need to carefully consider whether to depart from established case law and our democratically expressed community preferences". She felt the courts should limit themselves to saying whether they followed the law or not, and citizens should have the power to correct the courts when they propose changes. She felt that the courts are usurping the legislature's power and that courts need closer scrutiny and higher accountability.

{Tape: 2; Side: A; Approx. Time Counter: 21.8 - 25.6}

Opponents' Testimony:

SEN. JESSE LASLOVICH, Citizen and Law Student, stated that he is responding in opposition to SB 397 and SB 399 and said, "Somebody has got to stand up here and defend a system that has worked for over 225 years in this country". He noted that when the court made its school-funding decision, the court mandated what the law is because the legislature isn't following that law. He stated, "That is an independent judiciary".

{Tape: 2; Side: A; Approx. Time Counter: 25.6 - 30; Comments: End of Tape 2, Remarks continued on Tape 3.}

SEN. LASLOVICH continued by addressing the issue of accountability and said that the Supreme Court Justices are elected by the people. He stated that **SEN. BALYEAT** and the other proponents would be better served to recruit candidates that fit with their philosophy rather than try to change the system. He said, "Our founding fathers decided we needed an independent judiciary to protect us from ourselves". He pointed out that United States Supreme Court Justices have life-terms so they won't be subject to political influence and quotes that are printed in newspapers. He said that Montana's system is even better, as it is an eight-year-term to give them some independence. They are held accountable by elections.

He said that legislative hearings should be public, but open caucuses have become ineffective because legislators can't communicate without worrying about what will be printed in the newspapers. He stressed that if Supreme Court deliberations become public, they will become press conferences too. He stated that the Montana Supreme Court is not dictatorial. He said that he trusts the voters' judgment for electing the current Supreme Court and for electing each member of the legislature. He said that he firmly believes in three separate branches of government. The judiciary is a distinct, independent branch and they are not subject to the political pressures and influences of the State. He respectfully requested that the bills be tabled.

{Tape: 3; Side: A; Approx. Time Counter: 0 - 5.6}

Chris Manus, Executive Director, State Bar of Montana, stated they are opposed to SB 391, SB 392, SB 394, SB 397, SB 399, and SB 400. He noted that **SEN. BALYEAT** gave no determination of which of the bills are the most critical to consider for his proposed judicial reform.

The current Justice of the Supreme Court, Justice Renquist, provides a judicial report every year. The most recent report indicated there are currently two key issues: funding and judicial activism. Justice Renquist indicated that criticism of judges is as old as our republic and emphasized that tensions between the different branches of government are healthy in maintaining a balance of power. Mr. Manus said, "**SEN. BALYEAT'S** bills intend to upset the tension without a good cause". He handed out "Justices of the Montana Supreme Court since 1977", a list of the justices and their terms, and spoke about each bill.

EXHIBIT (jus40a09)

- 1) SB 391 - The majority of past justices have served within the time limit being proposed.
- 2) SB 392 - Making justices part-time and lowering their pay would not attract or retain highly qualified individuals.
- 3) SB 394 - Having non-lawyers interpreting the Constitution is not appropriate.
- 4) SB 397 - The legislature already has the opportunity to make policy decisions and enact those statutes it feels are appropriate.
- 5) SB 399 - Deliberations on litigation matters that are weighty decisions for individuals in this state should not be open.
- 6) SB 400 - Having venues changed every two years based on speakers of the house and the senate would create a logistics problem.

{Tape: 3; Side: A; Approx. Time Counter: 5.6 - 17}

Boris Brusett, representing the Seventh Day Adventist Church, voiced opposition to SB 397 because of the potential to affect the church's existence. This legislation would take away the ability of the courts to guarantee to all persons certain basic freedoms and rights set forth in Montana's Constitution. He referred to things that affect the church such as freedom of worship, freedom of assembly, freedom of speech, and equal protection under the law regardless of religious affiliation. It would place basic rights under authoritarian rule subject to the collective views of a legislative 2/3 majority. He stated that SB 397 could have a potentially devastating effect on any minority group and asked for a DO NOT PASS.

{Tape: 3; Side: A; Approx. Time Counter: 17 - 19.1}

Informational Testimony:

Dan Shea, Helena Citizen, spoke about SB 400 and said there is a problem with the way lawsuits are filed because they are usually filed in Lewis and Clark County. He recommended that if the venue is continued in Lewis and Clark County, that they have a rotating base of district judges from all over the state to be called in on these cases. The power over these cases should not reside only in the district judges that reside in Lewis and Clark County.

He said he did not agree with most of the bills, but he did agree with the concerns the people have about the Supreme Court. It has become increasingly isolated in the way it makes decisions. An example would be when an appeal is filed, only about 20 cases a year are argued, and hardly ever to the full court. He stated that in 75% of the cases, the lawyers and the parties they

represent don't know who is going to decide their case until the decision comes out. He said that is undemocratic. The remedy is for the Supreme Court to say that anytime a case is submitted on briefs the parties shall be notified of the panel that has been chosen to decide that case. That is important because a defendant or plaintiff may have reason to seek disqualification of a judge for bias or prejudice.

{Tape: 3; Side: A; Approx. Time Counter: 19.1 - 27.6}

Questions from Committee Members and Responses:

SEN. MCGEE referred to prior testimony concerning "weighty matters" and asked whether the court's "weighty matters" are more "weighty" than those that the Legislature or the Executive Branch weighs. **Mr. Manus** said, "In each of those bodies they consider those matters as important for their responsibility and their roles as they are to be performed under our Constitution".

SEN. MCGEE asked how it can be said the Supreme Court should still have the ability to have closed meetings, since our Constitution makes no differentiation about State agencies, does not exclude the Supreme Court, and no one else has that privilege enumerated in the Constitution. **Mr. Manus** said he thought his testimony indicated that the open meeting statute provides an exception for those matters involving litigation. He said, "I was drawing the analogy that the Supreme Court's deliberations are, in fact, deliberations over litigation involving members of our state. Therefore, under that exception, I would submit that those conferences should not be open".

SEN. O'NEIL asked if a randomly selected district court might work. **SEN. BALYEAT** said the only problem with Dan Shea's approach of having a preset list of judges would be that people could still "shop" for a favorable judge to bring a case against the legislature; they would just wait until that judge came up on the list. A randomly selected district judge might be workable.

SEN. CROMLEY asked if other states have managed to avoid the Montana Supreme Court's trend of increasing dominance. **SEN. BALYEAT** said there have always been judicial activists. He stated that other activist courts such as Nevada and Vermont do not have nearly as many "numbers" as the Montana Supreme Court.

SEN. CROMLEY said he would take that as a negative answer, and that other states have not seen increasing dominance by their supreme court. He asked if the other states have avoided the increasing dominance by resorting to any of the measures just presented to the committee, or by some other means. **SEN. BALYEAT**

said he had not done an analysis of all the other states to see which states might have adopted these or similar bills. He stated that the State of New York has partisan election of judges at the lower levels and has had for decades. Some reforms are evident in some states. Montana diverged from historical jurisprudence and is a long way from the rest of the states.

{Tape: 3; Side: B; Approx. Time Counter: 0 - 15.2}

Closing by Sponsor:

SEN. BALYEAT addressed SB 400 and the reasons a different venue is needed to hear lawsuits against the legislature. Even honest people have unconscious biases that surface. He referred to the school funding lawsuit and said the judge didn't see the whole picture because he was coming from a different frame of reference. He argued that the Montana Supreme Court is outside of the historical system that has been used for 225 years to restrain themselves; that they have abandoned that historical system. He felt judges should be elected from seven different legislative districts across the state. He gave a rebuttal for the earlier comments made by opponents and asked for support of his bills.

With no further business, **CHAIRMAN WHEAT** adjourned the meeting.

{Tape: 3; Side: B; Approx. Time Counter: 15.5 - 28.1}

ADJOURNMENT

Adjournment: 10:38 A.M.

SEN. MIKE WHEAT, Chairman

LINDA KEIM, Transcribing Secretary

MW/lk

Additional Exhibits:

EXHIBIT ([jus40aad0.PDF](#))